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U.S. DISTRICT COURT
SAN FRANCISCO, CALIFORNIA

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Attorneys for Defendants
ORTHO-MCNEIL PHARMACEUTICAL, INC.
and MCKESSON CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EDL

JENIFER ARGENBRIGHT, an individual;
BERLINE BROWN, an individual;
JENNIFER BURGOS, an individual;
TAMANDA CLAY, an individual;
TAMEKIA COOPER, an individual;
KIYANA DORSEY, an individual;
VALENCIA DOWDY, an individual;
PATRICIA EMBURY, an individual;
TENILLE EVANS, an individual;
MARTHA GREENWALT, an individual;
BRANDY HEBERT, an individual;
YOLANDA HENDERSON, an individual;
RAINA HENNING, an individual; AMY
HERNANDEZ, an individual; CARRISA
HODGES, an individual; ALIKE JASON,
an individual; CHRISTIE JENNINGS, an
individual; KAYLA JOHNSON, an
individual; REBECCA KLAHS, an
individual; NANCY LAMPKA, an
individual; TASHA LEAVY, an individual;
PAMELA LUCAS, an individual; KATIE
MARTIN, an individual; SHARON
MASON, an individual; CALLENA
MAUPIN, an individual; MICHELLE
MCMILLIAN, an individual; DAYANITA
MEDJESKY, an individual; CRYSTAL
MEYER, an individual; TONI MEZA, an
individual; STEPHANY MILLER, an
individual; KATHERINE MOCZULSKI,
an individual; BETHANY MORGAN, an
individual; ANA PADILLA, an individual;
BRENDA B. PEREZ, an individual;
DIANA PLUMMER, an individual;
LATOSHA PREVOST, an individual;
JULIE ROBLES, an individual; SYLVIA
SANDOVAL, an individual; SHANELL

Case No. 07

3423

**NOTICE OF REMOVAL AND REMOVAL
OF ACTION UNDER 28 U.S.C. § 1441(B)
[DIVERSITY]**

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1 SHEARD, an individual; SHERI SIMS, an
2 individual; HELEN SMITH, an individual;
3 JORETH SPANN, an individual;
4 KAMIKA SPENCER, an individual;
5 HEATHER SPURRIER, an individual;
6 REBECCA STAHL, an individual; KATIE
7 TANIS, an individual; ANTONIA
8 THOMAS, an individual; BRITNEY
9 VALEAD, an individual; ERICA
10 VALENTIN, an individual; KRISTIN
11 WALSH-MONTANEZ, an individual;
12 EMILIA WILLIAMS, an individual;
13 REBECCA WORKMAN, an individual;
14 MELISSA ZALES, an individual,

Plaintiffs,

v.

11 ORTHO-MCNEIL PHARMACEUTICAL,
12 INC., a Delaware Corporation;
13 MCKESSON CORP. and DOES 1-500,
14 inclusive,

Defendants.

TO THE CLERK OF THE COURT:

Defendant Ortho-McNeil Pharmaceutical, Inc. ("OMP") removes to this Court the state court action described below, based on diversity of citizenship, pursuant to 28 U.S.C. §1332. As detailed here, the Court should disregard the citizenship of defendant McKesson Corporation ("McKesson") and of plaintiff Diana Plummer (the "New Jersey plaintiff") because plaintiffs fraudulently joined those parties. In the alternative, the Court should sever plaintiffs' fraudulently joined claims and exercise diversity jurisdiction over all but the New Jersey plaintiff's claims.

BACKGROUND

1. On May 11, 2007, the Southern California law firms of Law Offices of Shawn Kohrrami and Kabateck Brown Kellner LLP and the Colorado law firm of Burg Simpson Eldredge Hersh Jardine PC filed a personal injury action in the Superior Court of California, County of San Francisco, entitled *Jenifer Argenbright, et al. v. Ortho-McNeil Pharmaceutical, Inc., McKesson Corp., and Does 1-500, inclusive*, Case Number CGC-07-463331. A copy of the Complaint in that San Francisco County state court action (the "Complaint") is attached as Exhibit A to the accompanying Declaration of Brenda N. Buonaiuto ("Buonaiuto Dec.").

The 53 individual plaintiffs in the action include residents of 29 states, who seek damages for "severe" personal injuries they allegedly suffered from using the Ortho Evra® contraceptive patch, available only by prescription and manufactured by OMP. (Complaint ¶¶ 1-2, 10-62.) Only one of the 53 plaintiffs resides in California, and none reside in San Francisco County. (Complaint ¶¶ 10-62.) Plaintiffs' claims have nothing in common, other than that they all allege to have used Ortho Evra®. (*See* Complaint.) Plaintiffs allege causes of action for Negligence, Strict Liability Failure to Warn, Breach of Express Warranty, Breach of Implied Warranty, Negligent Misrepresentation, and Fraud against OMP, a Delaware corporation with its principal place of business in New Jersey. (Complaint ¶ 63; Buonaiuto Dec. ¶ 3.) Although devoid of any factual allegations against McKesson, plaintiffs' complaint asserts those same claims against

McKesson, a Delaware corporation with its principal place of business in San Francisco, California, whom plaintiffs allege “distributed and sold Ortho Evra in and throughout the State of California.” (Complaint ¶¶ 3, 68; Declaration of Greg Yonko, filed in *Abel, Theresa, et al. v. Ortho-McNeil Pharmaceutical, Inc., et al.*, USDC ND CA Case No. C 06 7551 SBA (“Yonko Dec.”), attached to the Buonaiuto Dec. as Exhibit B, ¶ 2.)

BASIS FOR JURISDICTION

2. Basis for Jurisdiction in this Court. This Court has original jurisdiction over this action, and OMP may properly remove to this Court, because the amount in controversy exceeds \$75,000, exclusive of interest and costs, and there is diversity of citizenship of all named parties not fraudulently joined. 28 U.S.C. §§ 1332, 1441(a).

a. Amount in Controversy. Pursuant to California Code of Civil Procedure Section 425.10(b), the amount of damages sought by plaintiffs is not stated in the Complaint. However, the 53 plaintiffs claim that they have *each* “suffered and/or may continue to suffer potentially fatal side effects such as strokes, pulmonary emboli, blood clots, deep vein thrombosis, and heart attacks” from using Ortho Evra®. (Complaint ¶ 1; *see also* ¶ 91, alleging that plaintiffs have suffered “strokes, pulmonary emboli, blood clots, deep vein thrombosis, and heart attacks, as well as other severe permanent health problems.”) Plaintiffs further allege that OMP engaged in “fraudulent” and “reckless” conduct, giving rise to punitive damages claims. (*See e.g.* Complaint ¶¶ 89, 100, 102, 115-117, 127, 142, 148, 153-156.)

Given the nature of plaintiffs’ claims, and a review of damages awards and settlement amounts in this judicial district, in cases involving allegations of serious injuries from the use of prescription drugs or medical devices, it is reasonably believed that, if plaintiffs succeeded in proving the allegations of the Complaint, they would each recover a minimum of \$75,000 in damages. (Buonaiuto Dec. ¶ 11.) Indeed, plaintiffs claiming substantially similar injuries in the Ortho Evra® MDL have specifically alleged that the amount in controversy in their respective actions exceeds \$75,000, exclusive of interest and costs. (*Id.*)

It is therefore “facially apparent” from the nature of the claims alleged and the types of damages sought that the amount in controversy as to each plaintiff in this action exceeds \$75,000, exclusive of interest and costs. *See White v. FCI USA, Inc.*, 319 F.3d 672, 674 (5th Cir. 2003) (it was “facially apparent” that claim exceeded \$75,000 based on plaintiff’s “lengthy list of compensatory and punitive damages”); *see also In re Rezulin Products Liability Litigation*, 133 F.Supp.2d 272, 296 (S.D.N.Y. 2001) (concluding that complaint “obviously asserts a claim exceeding \$75,000” where plaintiff seeks “compensatory and punitive damages” for alleged “serious and life-threatening medical conditions” due to use of prescription medicine); *International Padi, Inc. v. Diverlink*, 2005 WL 1635347, *1 (9th Cir. Cal. 2005) (court considered plaintiffs’ general allegations of unspecified general and special damages “reasonably believed to be in excess of the jurisdictional limits” of the trial court and their request for injunctive relief to “easily conclude” that the \$75,000 amount in controversy requirement was met).

b. Citizenship of the Parties. There is complete diversity of citizenship between those parties not fraudulently joined. As alleged in the Complaint, plaintiffs (other than the fraudulently joined New Jersey plaintiff), are citizens variously of Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. (Complaint ¶¶ 10-62.) At the time the state court action was filed and at the time of this removal, OMP was and is a corporation existing under the laws of the State of Delaware, with its principal place of business in New Jersey. (Buonaiuto Dec. ¶ 3.) Therefore, diversity of citizenship exists between plaintiffs and OMP, pursuant to 28 U.S.C. Section 1332.

c. All Non-Diverse Parties have been Fraudulently Joined.

1. Plaintiffs Fraudulently Joined McKesson. The only other named defendant in this action, McKesson, is a Delaware corporation with its principal place of business in San Francisco, California. (Yonko Dec. ¶ 2.) McKesson has no potential liability to

1 plaintiffs or to any of them. Rather, plaintiffs named McKesson as a “sham” defendant in
 2 an effort to destroy diversity and to prevent this case from being removed to federal court
 3 and then transferred to the Ortho Evra® MDL, which is pending in the Northern District
 4 of Ohio. (Buonaiuto Dec. ¶ 6.)

5 A defendant is fraudulently joined if “the plaintiff fails to state a cause of action
 6 against the defendant, and the failure is obvious according to the settled rules of the
 7 state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (where non-
 8 diverse defendant is fraudulently joined, there is an exception to the requirement of
 9 complete diversity); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)
 10 (“fraudulently joined defendants will not defeat removal on diversity grounds”). “When
 11 determining whether a defendant is fraudulently joined, “[t]he court may pierce the
 12 pleadings, consider the entire record, and determine the basis of joinder by any means
 13 available.” *Maffei v. Allstate California Ins. Co.*, 412 F.Supp.2d 1049 (E.D.Cal. 2006),
 14 citing *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D.Cal. 1979) (“it is well settled that upon
 15 allegations of fraudulent joinder ... federal courts may look beyond the pleadings to
 16 determine if the joinder ... is a sham or fraudulent device to prevent removal”). If
 17 revealed that the joinder is fraudulent, the Court may dismiss the sham defendant.
 18 *Maffei, supra*. McKesson is so fraudulently joined here.

19 McKesson is fraudulently joined because plaintiffs have not made any material
 20 allegations against it. *See e.g. Brown v. Allstate Insurance*, 17 F.Supp.2d 1134, 1137
 21 (S.D.Cal. 1998) (finding in-state defendants fraudulently joined where “no material
 22 allegations” against those defendants were made). Here, as demonstrated by the
 23 Complaint, plaintiffs’ claims are substantively directed against the manufacturer of Ortho
 24 Evra® – OMP, and not at McKesson. Indeed, none of plaintiffs’ factual allegations, on
 25 which all of their causes of action are based, involve McKesson. (*See* “General
 26 Allegations” at Complaint ¶¶ 76-91.) Specifically, plaintiffs claim that: OMP obtained
 27 FDA approval of Ortho Evra®, despite concerns about its safety; OMP failed to
 28 appropriately warn users and prescribing health care providers of the alleged serious risks

of using Ortho Evra®; OMP failed to properly or adequately investigate safety concerns about Ortho Evra®; OMP's conduct fell below the duty of care that it allegedly owed to plaintiffs; OMP misrepresented the known risks associated with Ortho Evra®; OMP negligently and recklessly failed to inform the public and prescribing health care providers of the alleged risks of using Ortho Evra®; and OMP was careless and negligent in its manufacturing, testing, selling, distributing, merchandising, advertising, promoting, packaging, and marketing of Ortho Evra®.¹ (*Id.*) Those allegations have everything to do with the claimed acts and omissions of OMP, and nothing to do with McKesson.

The only factual allegations that do relate to McKesson fail to state a claim against that defendant. Plaintiffs allege that McKesson "distributed and sold Ortho Evra in and throughout the State of California," and that McKesson "packaged, distributed, supplied, sold, placed into the stream of commerce, labeled, described, marketed, advertised, promoted and purported to warn or to inform users regarding the risks pertaining to, and assuaged concerns about the pharmaceutical Ortho Evra." (Complaint ¶¶ 3, 71.) Notably absent is any allegation that the plaintiffs or any of them fall within the general class of "users" referenced by plaintiffs' conclusory allegations. Even more telling, plaintiffs do not allege that McKesson distributed or sold Ortho Evra® to any of the 53 of them – only one of whom even lives in the State of California – or to any of their respective health care providers or pharmacists, much less to all of them. (*See*, Complaint.) Further, the Complaint lacks any allegation that McKesson sold or distributed Ortho Evra® outside the State of California, where 52 of the 53 plaintiffs reside. The absence of such allegations compels the conclusion that plaintiffs fraudulently joined McKesson in an attempt to defeat diversity jurisdiction. *See e.g. Lyons v. American Tobacco Co.*, 1997 WL 809677 at *5 (S.D. Ala. 1997) (holding that there is "no better admission of fraudulent joinder" than the failure of plaintiff "to set forth any specific factual allegations" against the non-diverse defendant). Plaintiffs cannot cure this deficiency by

¹ As detailed in its Answer, filed simultaneously with this Removal, OMP denies plaintiffs' allegations and denies that it is liable to plaintiffs in any manner or sum whatsoever.

1 relying on allegations directed toward “Defendants” generally or toward OMP. *See In re*
 2 *PPA Products Liability Litigation*, MDL No. 1407, Docket No. C02-423R (W.D.Wash.
 3 Nov, 27, 2002), Slip Op. at 5 (attached to Ex. C to Buonaiuto Dec.) (allegations directed
 4 toward “defendants” or “all defendants” insufficient).

5 In short, plaintiffs fail to allege that they received Ortho Evra® sold or distributed
 6 by McKesson, a prerequisite to their product liability claims. It is essential that a plaintiff
 7 who claims that a product distributed by defendant was defective must prove that
 8 defendant was the distributor. *Garcia v. Joseph Vince Co.*, 84 Cal.App.3d 868, 874
 9 (1978) (“Regardless of the theory which liability is predicated upon ... it is obvious that to
 10 hold a producer, manufacturer, or seller liable for injury caused by a particular product,
 11 there must first be proof that the defendant produced, manufactured, sold, or was in some
 12 way responsible for the product”). Notwithstanding, given that the crux of plaintiffs’
 13 claims is an alleged failure to warn of the alleged risks of using Ortho Evra®, there is no
 14 legal basis for the causes of action asserted against McKesson.

15 Under California law, McKesson bears no duty to warn. Rather, the “learned
 16 intermediary doctrine” provides that the duty to warn of a drug’s risk runs from the
 17 manufacturer to the physician, and then from the physician to the patient. *See Brown v.*
 18 *Superior Court (Abbott Labs.)*, 44 Cal.3d 1049, 1061-62, n.9 (1988); *Carlin v. Superior*
 19 *Court (Upjohn Co.)*, 13 Cal.4th 1104, 1116 (1996). The rationale of the learned
 20 intermediary doctrine is that the physician is in the best position to determine whether a
 21 patient should use a prescription drug, and imposing a duty to warn on others would
 22 threaten to undermine reliance on the physician’s informed judgment. For this reason,
 23 California courts have rejected imposing liability on distributors, including specifically
 24 McKesson, for failure to warn of the risks of using a prescription drug. *See e.g. Barlow*
 25 *v. Warner-Lambert Co.*, Case No. CV-03-1647-R(RZx), Slip Op. at 2 (C.D.Cal. April 28,
 26 2003) (attached as Ex. D to the Buonaiuto Dec.) (“the Court finds that there is no
 27 possibility that plaintiffs could prove a cause of action against McKesson, an entity which
 28 distributed [the prescription medication at issue] to pharmacists in California;” motion to

remand denied); and *Skinner v. Warner-Lambert Co.*, Case No. CV-03-1643-R(RZx), Slip Op. at 2 (C.D.Cal. April 28, 2003) (attached as Ex. E to Buonaiuto Dec.) (same).

Further, McKesson had no involvement in the development or preparation of the prescribing information for Ortho Evra® and did not have any responsibility for the content of other written warnings concerning Ortho Evra®. (Yonko Dec. ¶ 5.) At no time has McKesson had any involvement with the manufacture, development, testing, packaging, labeling, advertising, promotion, or marketing of Ortho Evra®. (*Id.* ¶¶ 6-7.)

It is therefore a mystery why McKesson is named in this case, other than as a “sham” defendant to destroy diversity jurisdiction and to prevent OMP from removing the action to federal court and then transferring it to the Ortho Evra® MDL. Courts have consistently ruled that such collusive tactics are not to be recognized. *See e.g. Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593 (9th Cir. 1996) (noting there is no more reason for federal courts to countenance destruction of jurisdiction by the use of straw parties than there is for them to countenance the creation of jurisdiction in that manner). The Court should therefore disregard the citizenship of McKesson in determining whether the requisite diversity exists.

2. Plaintiffs Fraudulently Joined the New Jersey Plaintiff. Once McKesson drops out of the analysis, there is complete diversity, with the exception of the New Jersey plaintiff and OMP. The New Jersey plaintiff lacks any basis to sue OMP, a Delaware corporation with its principal place of business in New Jersey, in a San Francisco, California state court. The New Jersey plaintiff does not allege any connection between her or her injuries and San Francisco, California. (*See* Complaint.) The New Jersey plaintiff does not allege that she purchased Ortho Evra® in San Francisco, California or that she saw any health care providers for her injuries here. (*Id.*) Rather, the New Jersey plaintiff resides in New Jersey, her alleged injuries presumably occurred in New Jersey, and her health care providers and any other relevant witnesses and evidence are presumably located in New Jersey. (*Id.* ¶¶ 44.) Her claims against OMP are therefore more appropriately and justly tried in New Jersey. *See* Cal. Civ. Proc.

Code § 410.30 (“When a court finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall ... dismiss the action in whole or in part on any conditions that may be just”). There is simply no basis for the New Jersey plaintiff to proceed against OMP in San Francisco. It is therefore clear that plaintiffs joined the New Jersey plaintiff for the sole purpose of defeating diversity, and the inclusion of the New Jersey plaintiff is simply another “sham” that should also be disregarded.²

3. Alternatively, the Court Should Sever All of Plaintiffs’ Fraudulently Joined Claims. Alternatively, this Court should sever plaintiffs’ unrelated claims into individual actions and take diversity jurisdiction over all of those claims, with the exception of those asserted by the New Jersey plaintiff, so that those actions may then be transferred to the Ortho Evra® MDL. The practice of joining a non-diverse plaintiff to defeat diversity has been described by at least one MDL court as “an innovative, but unwise, pleading strategy that interferes with the court’s ability to administrate the case for pretrial purposes.” *In re Diet Drugs Products Liability*, 1999 WL 554584 at *5 (E.D.Pa. 1999) (held that even if non-diverse plaintiff has valid cause of action against defendant, that plaintiff may not prevent removal based on diversity jurisdiction if there is no reasonable basis for joinder with other plaintiffs claims). Indeed, federal “courts have repeatedly held that misjoined plaintiffs will not defeat diversity” and that the remedy is severing the non-diverse claims. *In re Prempro Products Liability Litigation*, 417 F.Supp.2d 1058, 1059 (E.D.Ark. 2006). The *Prempro* court identified a host of other situations where the courts severed misjoined plaintiffs under similar circumstances. *See e.g. In re Orthopedic Bone Screw Products Liability*, 1995 WL 428683 (E.D.Pa. 1995); *In re Rezulin Products Liability Litigation*, 168 F.Supp.2d 136, 145 (S.D.N.Y. 2001); *In re Diet Drugs*, *supra*, 1999 WL 554584 at *4; and *In re Baycol Products Liability*

² To the extent the New Jersey plaintiff would argue that she joined this case to “pool resources,” there is coordinated litigation pending against OMP in New Jersey, which she could have joined, *In re Ortho Evra Birth Control Patch Litigation*, Superior Court of New Jersey, Middlesex County, Case No. 275.

1 Litigation, 2003 WL 22341303 (D.Minn. 2003).

2 These cases are particularly instructive here. Plaintiffs are residents of 29
3 different states and were therefore presumably prescribed Ortho Evra® by different
4 doctors, used the drug for different lengths of time, and suffered different injuries. The
5 health care providers and other relevant witnesses, all located in counties and states
6 outside San Francisco County, California, would not be compelled to attend trial here.
7 The only thing common among plaintiffs is that they each allegedly used Ortho Evra®.
8 That alone is not enough. *Greene v. Wyeth*, 344 F. Supp.2d 674, 684-85 (D.Nev. 2004)
9 (in 9th Cir.) (held that ingestion of same drug among various plaintiffs not sufficient basis
10 to permit all plaintiffs to join in one action).

11 OMP's "statutory right of removal has been frustrated by plaintiffs' improper
12 joinder, and the interests of judicial expediency and justice weigh in favor of severance."
13 *Wyeth, supra*, 344 F.Supp.2d at 685. "Removal based on diversity of citizenship is a
14 right conferred by Congress, the need for which 'may well be greatest when the plaintiff
15 tries hardest to defeat it.'" *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990),
16 *citing* American Law Institute, Study of the Division of Jurisdiction Between State and
17 Federal Courts, Official Draft, at 169 (1969). As such, the Court should alternatively
18 sever plaintiffs' individual claims and should exercise diversity jurisdiction over all but
19 the New Jersey plaintiff's case. OMP can then move the state court to transfer that
20 remaining case to New Jersey state court – the more appropriate and convenient forum.
21 Absent that result, the right of a party to obtain diversity jurisdiction would be "rendered
22 illusory." *Grassi, supra*, 894 F.2d at 185 (federal district courts have both the authority
23 and the responsibility to examine motives underlying partial assignment which destroys
24 diversity and to disregard assignment in determining jurisdiction if it is found to have
25 been made principally to defeat removal).

26 d. Citizenship of Doe Defendants. Pursuant to 28 U.S.C. Section
27 1441(a), for purposes of removal, the citizenship of defendants Does 1-500 must be
28 disregarded because plaintiffs sued those defendants under fictitious names.

REMOVAL TIMELY FILED

3. Service was made on OMP's registered agent for service of process on June 12, 2007. (Buonaiuto Dec. ¶ 3.) McKesson was served, via its registered agent, on June 20, 2007. (*Id.* ¶ 4.) Therefore, this Removal was timely filed within 30 days of service, pursuant to 28 U.S.C. § 1446(b).

CONSENT TO REMOVAL

4. The only other named defendant, McKesson, was fraudulently joined, and its consent is therefore not required for removal; notwithstanding, McKesson consents to OMP's removal of this action to this Court. (Buonaiuto Dec. ¶ 4.)

STATE COURT WITHIN THE COURT'S JURISDICTION

5. The San Francisco County, California Superior Court, from which OMP removes this action, is within this Court's jurisdiction.

STATE COURT PLEADINGS

6. Copies of the state court pleadings known to OMP to have been filed in this action are collectively attached to the Buonaiuto Dec. as Exhibit A.

FILING AND SERVICE OF NOTICE OF REMOVAL AND REMOVAL

7. OMP will file a notice of the filing of this Notice of Removal and Removal in the San Francisco County Superior Court and will serve plaintiffs' counsel with a copy. (Buonaiuto Dec. ¶ 5.)

WHEREFORE, OMP hereby removes to this Court San Francisco County Superior Court Case No. CGC-07-463331.

Dated: June 29, 2007

DRINKER BIDDLE & REATH



BRENDA N. BUONAIUTO

Attorneys for Defendants

ORTHO-MCNEIL PHARMACEUTICAL,
INC. and MCKESSON CORPORATION